

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA)

Plaintiff,)

vs.)

ROBERT DAVID KAHRE, *et al.*,)

Defendants.)

2:05-CR-0121-RCJ-RJJ

ORDER

This matter comes before the Court on Defendant Joel Axberg's Objections to Magistrate Judge Johnston's Order Regarding Motion for Recusal. (#1252.) Defendants Robert Kahre and Lori Kahre filed Motions for Joinder to Defendant Axberg's Motion. (*See* #1279, #1295.) The Court has considered the Motions, the pleadings on file, and oral argument on behalf of the parties and hereby issues the following Order.

BACKGROUND

On May 2, 2006, Defendant Alexander Loglia filed his Motion for Evidentiary Hearing and Notice of Possible Source of Judicial Bias and Prejudice. (#445.) Defendant Robert Kahre filed his Motion for Recusal of Judge Johnston on May 5, 2006. (#454.) Defendant Loglia's Motion called for an immediate evidentiary hearing to investigate alleged incidents demonstrating Judge Johnston's improper actions with regard to the case at bar. Defendant Kahre's Motion sought the immediate recusal of Judge Johnston. Judge Johnston then held an evidentiary hearing on May 15, 2006. On April 30, 2007, Judge Johnston issued a written Order

1 denying both Defendant Loglia's and Defendant Kahre's Motions. (#1209.) Defendants now
2 object to Judge Johnston's Order and ask this Court to "issue an Order of Recusal regarding the
3 Magistrate Judge, the Honorable Robert J. Johnston." (See #1252 at 11.)

4 DISCUSSION

5 I. Defendants' Request for Recusal

6 In their Objections and Request for Recusal, Defendants proffer four main reasons why
7 this Court must order Judge Johnston's recusal: (1) the Magistrate Judge improperly presided
8 over the evidentiary hearing; (2) the Magistrate Judge conducted the evidentiary hearing in a
9 manner demonstrating improper bias; (3) the Magistrate Judge had knowledge of disputed facts;
10 and (4) the facts underlying the Magistrate Judge's participation in this case created an
11 appearance of impropriety. For the reasons stated at oral argument, and for the additional
12 reasons stated herein, the Court denies Defendants' Objections and accompanying Request for
13 Recusal.

14 A. Standard for Recusal

15 A judge must "disqualify himself in any proceeding in which his impartiality might
16 reasonably be questioned." 28 U.S.C. § 455(a). In addition, a judge must also disqualify himself
17 where he has "personal knowledge of disputed evidentiary facts concerning the proceeding . .
18 . ." *Id.* at § 455(b)(1). Section 455 does not specify the procedures used and is self-enforcing
19 on the part of the judge. As a federal judge is presumed to be impartial, a substantial burden is
20 imposed on the party claiming bias or prejudice to show that this is not the case. *See, e.g.,*
21 *United States v. Zagari*, 419 F. Supp. 494, 506 n.30 (N.D. Cal. 1976). A judge should recuse
22 himself when "a reasonable person with knowledge of all the facts would conclude that the
23 judge's impartiality might be reasonably questioned." *United States v. Hernandez*, 109 F.3d
24 1450, 1453 (1997).

1 Defendants. (May 9, 2007, Hr’g Tr. at 15 [hereinafter Tr.].) In response to the Court’s inquiry
2 regarding the subject of Judge Johnston’s anger, counsel for Defendant Axberg said that Judge
3 Johnston was becoming angrier and angrier at “the whole subject matter; the entire subject
4 matter; the hearing.” (*Id.* at 15:22-23.) Defendants also stated that Judge Johnston acted rudely
5 toward counsel for Defendant Robert Kahre in asking counsel “not to make that face at him.”
6 (*Id.* at 18:12.)

7 While Judge Johnston may have become “angry” or irritated during the evidentiary
8 hearing, any such emotions were directed toward defense counsel’s comments and arguments.
9 Nothing in the transcripts indicates that Judge Johnston was angry at the actual Defendants
10 themselves. For example, Judge Johnston ruled on several objections yet counsel continued to
11 disregard and argue over Judge Johnston’s rulings. Moreover, counsel for Defendants refused
12 to answer some of Judge Johnston’s questions. Any anger, lack of patience, or frustration was
13 clearly aimed at counsels’ methodology, not at the individual Defendants. Personal bias or
14 prejudice, to require recusal or remand to a different judge, must be against the actual party, not
15 against the attorney or the attorney’s methods. *See United States v. Burt*, 765 F.2d 1364, 1368
16 (9th Cir. 1985); *see also* 28 U.S.C. §§ 144, 455. Thus, Defendants’ “anger” argument fails.

17 Second, Defendants claim that Judge Johnston’s delay in issuing rulings and orders
18 evidences prejudice and bias against Defendants. While courts at times unfortunately
19 procrastinate or otherwise issue rulings in a less than timely manner, this fact alone is not
20 sufficient to establish bias or prejudice requiring recusal.

21 Third, Defendants argue that Judge Johnston’s acquaintance, through his church, with
22 Government witness Don Herman evidences Judge Johnston’s personal interest and bias in this
23 case. According to Defendants, “[t]he evidentiary hearing was nothing more than a forum for
24 the Magistrate Judge to exert his leadership role in the Church over the material witness at the

1 hearing in order to solicit the testimony the Magistrate Judge wanted on the record.” (#1252 at
2 7.) Mere membership in the same faith or church is not sufficient to justify recusal. *See In re*
3 *Mccarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004). Both Judge Johnston and Mr. Herman are
4 members of the Church of Jesus Christ of Latter-day Saints (the “LDS” church). The LDS
5 church is divided into geographical areas called “stakes.” Each stake has roughly 5,000-8,000
6 members. Currently, there are twenty five stakes in the Las Vegas valley. Each stake is headed
7 by a Stake Presidency consisting of a Stake President and two counselors. Each stake is further
8 divided into smaller geographical units called wards. Each stake has roughly five to ten wards.
9 While several wards might meet in the same meetinghouse, their meetings are held separately
10 and generally without interaction. At the time of the evidentiary hearing at issue, Judge Johnston
11 was a counselor in Mr. Herman’s stake presidency, but of a different ward or congregation. As
12 such he may meet periodically with members of the stake, including Mr. Herman, for
13 ecclesiastical-type interviews or meetings. Thus, on infrequent occasion, Judge Johnston and
14 Mr. Herman could have met or interacted in church settings. However, Defendants’ mere
15 allegation, without any proof here, that Judge Johnston used his leadership role in his church to
16 influence Mr. Herman’s testimony cannot provide basis for recusal. *See Singer v. Wadman*, 745
17 F.2d 606, 608 (10th Cir. 1984) (refusing to disqualify a judge, who was LDS, when plaintiff
18 challenged “the theocratic power structure of Utah”).

19 Defendants further allege that Judge Johnston and Mr. Herman improperly discussed the
20 case at bar in church settings. However, as analyzed below, Defendants fail to introduce
21 evidence supporting this theory. For the reasons stated above and at oral argument, Defendants
22 fail to establish bias or prejudice on the part of Judge Johnston. Contrary to Defendants’
23 allegations, the Court has found that no conversations about the case occurred during an
24 interview between Judge Johnston and Mr. Herman; and in fact, no such interview occurred at

1 the time alleged according to the documentation referenced in the transcript of hearing before
2 Judge Johnston. Rather, a mention of Mr. Kahre's name may have been raised only in passing,
3 if at all, during brief encounter outside the church on that occasion.

4 **C. Personal Knowledge or Interest**

5 Defendants also contend that Judge Johnston has personal interest and knowledge in this
6 case requiring recusal. Defendants point to two meetings between Judge Johnston and Mr.
7 Herman as evidence of Judge Johnston's personal knowledge and interest. The first meeting
8 occurred after Defendant Robert Kahre's arraignment on May 20, 2005. The second meeting
9 occurred at a LDS church meetinghouse. Defendants allege that Judge Johnston discussed this
10 case with Mr. Herman at those meetings and asked Mr. Herman questions regarding Defendant
11 David Kahre. The only evidence Defendants proffer to support their argument is an affidavit
12 submitted by Mr. Kahre wherein Defendant Kahre summarizes statements allegedly told to him
13 by Mr. Herman. According to this affidavit, Mr. Herman allegedly told Mr. Kahre that Judge
14 Johnston had discussed the case with Mr. Herman.

15 The evidence in this case does not support Defendant Kahre's affidavit. At the
16 evidentiary hearing, Mr. Herman testified that the only discussion he ever had regarding
17 Defendants with Judge Johnston took place in Judge Johnston's chambers when Judge Johnston
18 invited Mr. Herman and his wife back to say hello. On the day in question, Judge Johnston
19 recognized Mr. Herman and his wife in the courtroom gallery. As noted above, the Hermans and
20 Judge Johnston were members of the same church or stake, but not of the same ward or
21 congregation. Accordingly, Judge Johnston invited them back to say hello. During their
22 conversation, Judge Johnston inquired as to why they were visiting his courtroom and if Mr.
23 Herman knew Defendant Kahre. According to Mr. Herman's testimony, other than that question
24 regarding Mr. Kahre's identity, he and Judge Johnston never discussed Defendant Kahre or any

1 aspects of the case. To constitute recusal, Defendants must show that Judge Johnston personally
2 knew the Defendants pre-indictment, knew some facts concerning the case from extrajudicial
3 sources, or had bias or prejudice against Defendants, whether stemming from extrajudicial or
4 judicially acquired sources. Mr. Herman testified in direct contradiction to Defendant Kahre's
5 affidavit that he never discussed the case with Judge Johnston. (*See* #508 at 31-93.) Indeed, Mr.
6 Ray, another witness called to testify at the evidentiary hearing, confirmed Mr. Herman's
7 testimony. Mr. Herman allegedly informed Defendant Kahre about the conversations he had
8 with Judge Johnston during a lunch meeting with Defendant Kahre and Mr. Ray. Mr. Ray
9 testified that Mr. Herman never told them about any alleged meetings with Judge Johnston to
10 discuss the case. (*See id.* at 102-118.)

11 Defendants have failed to demonstrate any evidence of personal knowledge or interest
12 on the part of Judge Johnston. There is no showing of extrajudicial sources of knowledge.
13 Judge Johnston did not know Mr. Kahre before this case started. The Court finds that other than
14 the simple inquiry as to whether Mr. Herman knew Defendant Kahre, Judge Johnston did not
15 have any conversations with Mr. Herman regarding the trial or Mr. Kahre. The only evidence
16 to which Defendants cite is the hearsay containing affidavit provided by Mr. Kahre. Defendants
17 admit they do not have any evidence other than these hearsay statements to support a finding of
18 Judge Johnston's alleged personal knowledge or interest in this case. (*See* Tr. at 32:10-11.) The
19 person who allegedly made the statements denied them in court under oath. To the contrary,
20 more than one witness testified under oath at the evidentiary hearing that those conversations
21 never took place. Judge Johnston simply had no knowledge about this case or the Defendants
22 prior to trial. He had no particular animus toward Defendants or those involved in tax cases
23 generally. Accordingly, for the reasons stated above and at oral argument, the Court finds that
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1 Defendants have failed to carry their burden in establishing Judge Johnston's personal
2 knowledge or interest in this case.

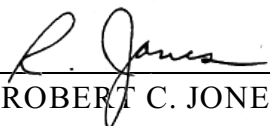
3 **D. Appearance of Impropriety**

4 Defendants state that the appearance of impropriety is established by the fact that Judge
5 Johnston had personal knowledge of disputed facts. (*See* #1252 at 10.) However, as noted
6 above, a federal judge is presumed to be impartial, and therefore a substantial burden is imposed
7 on the party claiming bias or prejudice to show that this is not the case. *See, e.g., United States*
8 *v. Zagari*, 419 F. Supp. 494, 506 n.30 (N.D. Cal. 1976). For the reasons stated above,
9 Defendants have failed to carry this burden.

10 **CONCLUSION**

11 For the reasons stated above and at oral argument, Defendants have failed to carry
12 their burden to establish bias, prejudice, or personal knowledge with respect to Judge
13 Johnston. Accordingly, IT IS HEREBY ORDERED that Defendants' Objections to
14 Magistrate Judge's Recusal Order and Request for Recusal (#1252) is *denied*. IT IS
15 FURTHER ORDERED that Defendants' Motions for Joinder (#1279 and #1295) are
16 *granted*.

17 DATED: July 13, 2007

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21 ROBERT C. JONES
22 UNITED STATES DISTRICT JUDGE
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